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SUNSETTING JUDICIAL OPINIONS

*Neal Katyal**

INTRODUCTION

Contemporary constitutional law, in its quest for judicial restraint, has primarily focused on “the how” of judging—what interpretive methods will constrain the decisionmaker? This Article, by contrast, focuses on the “when”—if there are reasons to think that today’s judicial decisions might later prove to be problematic, then are there methods that alter the *timing* of those decisions’ impact to produce better outcomes? This Article outlines one new method for judicial decisionmaking in the post-9/11 world. Informed by pervasive legislative practices, I contend that the Supreme Court should prospectively declare that some of its national security opinions will sunset, meaning that they will lapse as binding precedent.

Federal and state legislatures already employ a timing based mechanism when they are concerned about the long-term wisdom of a particular bill: the sunset clause is a favored method to avoid freezing law into place. For example, in the debates over the USA PATRIOT Act,¹ some thought that Congress had gone too far with the draft legislation, and feared that enacting a law quickly after the attacks of September 11, 2001, might eventually prove to be an over-reaction. A compromise was reached to sunset the Act, so that many of its provisions would be erased from the books within four years. Formally speaking, of course, even without a sunset, Congress always had the power to repeal the Act, but politicians on both sides of the aisle understood that such formality obscures the pervasive phenomenon of legislative inertia. The sunset was the principal device to ensure that the dramatic changes brought about by the USA PATRIOT Act would be questioned again, so that any bad law it contained would not stay on the books without the affirmative act of reauthorization.

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1 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

Today, we are asking the federal courts to do far more in balancing individual rights and national security than we have asked of the Congress. There are any number of reasons for this trend, predominant among them the Administration's dramatic assertions of unilateral power and maneuvering to avoid legislation on critical issues.² Judicial resolution of these national security questions, however, is fraught with problems similar to those that beset the legislature. Consider the claims made about legislators and the USA PATRIOT Act: the tendency to overreact to a crisis, the dynamics of limited information, the all-too-human desire for security to trump abstract ideals like liberty and equality. All of these observations apply to jurists as well. And the judiciary has two features that the legislature lacks: judges are largely unaccountable (in that they cannot be removed for unpopular decisions, whereas legislators who voted for a particular bill, such as the USA PATRIOT Act, can) and their decisions are entitled to stare decisis. Given these characteristics, it is quite surprising that no one has yet advocated judicial sunsets.

The lack of attention to judicial sunsets is even more surprising when one reads perhaps the most famous case of last term, *Grutter v. Bollinger*.³ In that case, Justice O'Connor, writing for a majority of the Court, stated: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."⁴ While some overeager folks are already engaging in a debate about what her statement means, at least one way to view it is as a judicial sunset. On this reading, Justice O'Connor was worried about a holding by the Court that would prevent affirmative action policies at universities from being contested in perpetuity.

Yet routinely we are given, as the answer to the most thorny national security/civil liberties dilemmas of the day, precedent from long ago. Are military tribunals constitutional? Well, the answer to that turns on what the Supreme Court said in 1942.⁵ Are enemy aliens stripped of their rights to habeas corpus? Well, the answer to that turns on what the Supreme Court said in 1950.⁶ And so on and so on. The debate here is stultifying and unilluminating. The answers to these vital questions should not turn, in any meaningful way, on

2 Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1260 (2002) (providing examples).

3 123 S. Ct. 2325 (2003).

4 *Id.* at 2347.

5 *Ex parte Quirin*, 317 U.S. 1, 44, 48 (1942) (holding the trial of Nazi saboteurs by military tribunals constitutional).

6 *Johnson v. Eisentrager*, 339 U.S. 763, 777-81 (1950) (holding that an enemy alien cannot obtain a writ of habeas corpus).

what a handful of Justices may have thought a half-century ago, in a different world, with different legal standards.⁷ Rather, they have to be decided by contemporary Justices translating the time-honored principles of our Constitution to facts of the modern era.⁸

Part I puts forth a theory for why judicial sunsets are necessary. The justification will turn not only on the need to avoid freezing bad law into place, but also on the impact the sunset will have for agenda setting. Because federal courts are passive creatures, and can only decide cases that come before them, pronouncements by the Supreme Court chill future litigation throughout the judiciary that questions the logic of previous decisions. As such, the reasoning and holding of Supreme Court decisions are not subject to a great deal of testing over time. Those brave litigants who seek to reopen a previous holding face the double-barreled certainty of losing at the federal district court and the court of appeals stages—for judges at each stage are bound to follow Supreme Court precedent, no matter how stale. Part II will then use the theory to explain how the judiciary could approach two pressing national security issues: the legality of military tribunals and the ability of detainees abroad to file habeas corpus actions in federal courts.

I. THE VIRTUES OF SUNSETS

A. *The Legislative Sunset*

The case for legislative sunsets is a familiar one. Congress, faced with the crisis du jour, has a tendency to overreact on the basis of limited information. We can see this both in cases where sunsets have been applied (such as the Independent Counsel Act)⁹ as well as ones where they have not (such as the crack cocaine mandatory-minimum

7 This is not a claim for a “living Constitution,” since the judgments earlier in time, like 1942 or 1950, may themselves have been incompatible with the original understanding of the Constitution as well. Rather, the claim here is that whichever constitutional methodology is selected, judges may err in their implementation of it—and that today’s judges should not be bound by the mistakes of their predecessors. Of course, there are often times when evolving events may change a constitutional determination and aid the Court in interpreting the text. See, e.g., *infra* Part II.B.

8 My claim in this Article is limited to the Supreme Court. Many of the arguments in favor of judicial sunsets apply to lower court judges as well, but they lack the national stare decisis power of the Supreme Court, and may have dissimilar resources. Similarly, my claims are confined to national security cases, and not other realms where temporary overreaction in the name of security might not be endemic and where the advantages of settled law may be greater.

9 28 U.S.C. § 591 (2000).

penalties).¹⁰ The overreaction could, in theory, be cured in subsequent years by new legislation, but in practice that rarely happens. And so we have any number of old statutes on the books that do not reflect modern understandings, whether they are criminal prohibitions on adultery¹¹ and sodomy,¹² drinking coffee,¹³ or on non-males dressing as Santa.¹⁴ Because it is so much harder to get legislatures to *do* something than it is to get them *not* to do something, statutes linger on the books long after they should be revised or removed. And so, when states have adopted sunset provisions, for example, the upshot has been dramatic change and innovation: one in five agencies that are reviewed under sunsets are terminated, one in three are modified, and "less than half" of such agencies are "re-created with little or no change."¹⁵ As this experience shows, the legislative sunset can help remedy the natural inertia of the legislature.

The inertia problems at the national level are compounded by our constitutional system, which gives the President veto power. In order to modify or remove existing legislation, it may take a

10 21 U.S.C. § 841 (2000).

11 See *Commonwealth v. Stowell*, 449 N.E.2d 357, 360-61 (Mass. 1983) (upholding criminal prohibition on adultery).

12 Numerous statutes criminalizing private, unforced, noncommercial acts of sexual intimacy among persons legally able to consent persisted until being struck down by courts. See, e.g., *Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003) (striking down TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2003)); *Jegley v. Picado*, 80 S.W.3d 332, 353-54 (Ark. 2002) (ARK. CODE ANN. § 5-14-122 (Michie 1997)); *Powell v. State*, 510 S.E.2d 18, 22 (Ga. 1998) (GA. CODE ANN. § 16-6-2(a) (2003)); *Commonwealth v. Wasson*, 842 S.W.2d 487, 498, 501 (Ky. 1992) (KY. REV. STAT. ANN. § 510.100 (Banks-Baldwin 1995)); *Gryczan v. State*, 942 P.2d 112, 126 (Mont. 1997) (MONT. CODE ANN. § 45-5-505 (2003)); *People v. Onofre*, 415 N.E.2d 936, 943 (N.Y. 1980) (N.Y. PENAL LAW §§ 130.38, 130.40 (McKinney 1998)); *Post v. State*, 715 P.2d 1105, 1109 (Okla. Crim. App. 1986) (OKLA. STAT. tit. 21, § 886 (West 2002)); *Commonwealth v. Bonadio*, 415 A.2d 47, 51 (Pa. 1980) (18 PA. CONS. STAT. ANN. §§ 3101, 3124 (2000), *repealed by* Act of March 31, 1995, 1995 Pa. Laws 985 § 7); *Campbell v. Sundquist*, 926 S.W.2d 250, 266 (Tenn. Ct. App. 1996) (TENN. CODE ANN. § 39-13-510 (2003)).

13 ROBERT WAYNE PELTON, LOONEY LAWS THAT YOU NEVER KNEW YOU WERE BREAKING 8 (1990). In Corvallis, Oregon, "there's a strict curfew for women. 'Young ladies' are expressly forbidden to drink any coffee after the hour of 6 p.m." *Id.*

14 *Id.* at 33 ("Beware if you just happen to be a female and live anywhere in the State of Minnesota. It's illegal for a woman to dress up and try to impersonate Santa on any city street. Violators can get fined up to \$25 and/or thirty days in the local jail.").

15 MARK R. DANIELS, TERMINATING PUBLIC PROGRAMS: AN AMERICAN POLITICAL PARADOX 34 (1997). For an extensive summary of state sunset provisions, see STAFF OF THE HOUSE SUBCOMM. ON THE LEGISLATIVE PROCESS, 97TH CONG., A COMPILATION OF STATE SUNSET STATUTES (Subcomm. Print 1983).

supermajority rather than a simple majority.¹⁶ Ex ante, the threat alone of the veto pen itself can prevent legislative revisions from bubbling up to the surface. So, too, the Constitution's insistence on bicameralism can stymie legislative change—even if 90% of the House of Representatives wants to modify an existing law, the Senate can thwart it (and perhaps even a minority of the Senate, given the filibuster, can do so). As such, even when a majority of Congress's members want to change a law that is already on the books, it can require substantial effort, energy, and political capital to translate that majority wish into successful legislation. In short, the Constitution incorporates structural features that predispose the legislature to inertia.¹⁷

Alongside the structural and political forces for inertia lies the obvious point that legislatures, composed of human beings, cannot anticipate every problem and are likely to make mistakes. As John Maynard Keynes put the problem when writing about Weimar Germany:

We cannot expect to legislate for a generation or more. The secular changes in man's economic condition and the liability of human forecast to error are as likely to lead to mistake in one direction as in another. We cannot as reasonable men do better than base our policy on the evidence we have and adapt it to the five or ten years over which we may suppose ourselves to have some measure of prevision; and we are not at fault if we leave on one side the extreme chances of human existence and of revolutionary changes in the order of Nature or of man's relations to her.¹⁸

16 See U.S. Const. art. I, § 7:

Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a law.

17 Cf. THE FEDERALIST NO. 73, at 470 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961):

They will consider every institution calculated to restrain the excess of law-making, and to keep things in the same state in which they happen to be at any given period, as much more likely to do good than harm; because it is favorable to greater stability in the system of legislation. The injury which may possibly be done by defeating a few good laws, will be amply compensated by the advantage of preventing a number of bad ones.

18 JOHN MAYNARD KEYNES, THE ECONOMIC CONSEQUENCES OF THE PEACE 190 (1920).

The costs of this inevitable human error are therefore exacerbated over time as bad or outmoded legislation stays on the books due to inertia.

These structural, political, and human error variables have induced many to support legislative sunsets. With the Independent Counsel Act, for example, a sunset was built into the law so that after five years, the statute would immediately lapse.¹⁹ Because the notion of an independent counsel was, at the very least, unfamiliar to our constitutional system, and because the policy implications were so severe, Congress decided to impose a sunset.²⁰ Looking back in hindsight, it is easy to see just how wise that decision was. It would have been extraordinarily difficult, given the political repercussions, for members of Congress to stand up and say that they are "against independent investigations" and "against ethics in government." Yet the Independent Counsel Act produced a constitutional monster, accountable to no one. Because of the sunset mechanism, now, fortunately, no Independent Counsel Act is on the books. It was simply too difficult, in the wake of Iran-Contra and the Whitewater/Lewinsky investigations, for members of Congress to stand up and affirmatively persuade their colleagues that the Act had to be reenacted.

Similar considerations led to the sunset provision in the USA PATRIOT Act. The debate on the proposed legislation produced a range of opinions, and led Yale Law School professor Bruce Ackerman to propose that the law sunset after a time.²¹ Despite the objec-

19 Independent Counsel Reauthorization Act of 1994, Pub. L. No. 103-270, § 2, 108 Stat. 732, 732.

20 See S. REP. NO. 95-170, at 76-77:

Section 598 is a sunset provision which states that all of the provisions of the new Chapter 39 . . . will cease to have effect five years after the date on which it takes effect Five years is a reasonable time period to permit the provisions of this chapter to operate and then to review those provisions to see if too many or too few special prosecutors have been appointed, to determine whether there is a need for a revision of the standards defining when a conflict of interest exists, or to determine if there is a need to revise the method of appointment, the method of removal, or any other significant portion of this chapter.

Id.; H.R. REP. NO. 95-1307, at 11 ("Section 598, 'Termination of effect of chapter,' is in essence a sunset provision for the special prosecutor mechanism The purpose of this provision is to enable the Congress to review how the legislation has operated in order to determine whether the mechanism should be retained or changed.").

21 See Bruce Ackerman, *Sunset Can Put a Halt to Twilight of Liberty*, L.A. TIMES, Sept. 20, 2001, at B15. Ackerman notes that

[i]t is one thing to pass emergency legislation; quite another to make it a permanent part of our law. Any congressional enactment should come with a sunset provision, requiring the law to lapse after two years unless it is reen-

tions of Attorney General John Ashcroft, the Ackerman proposal appeared in the House version of the bill.²² House Majority Leader Dick Armey explained that “[t]hese tools give the government much increased capability to do surveillance on American citizens,” but that “the sunset is a very important matter with a lot of our members”²³ because it affords an opportunity to “see how well [the Act’s provisions] work, how effective they’ve been, and how responsibly these tools have been used. Our rights as citizens are a big part of what we’re fighting for.”²⁴

In the final and ultimately successful version of the legislation, section 224 specified sunsets for various aspects of the USA PATRIOT Act. Designated for sunset are provisions that, for example, govern the authority to intercept wire communications relating to terrorism, liberalize the sharing of intelligence information within the United States government, authorize roving surveillance, permit the government to engage in broad third party searches for records, and authorize the seizure of voice-mail.²⁵ As Senator Leahy has recently remarked, section 224 permits review and reconsideration of these grants of power to law enforcement before they are “etched into stone.”²⁶

acted. During the interim, Congress should create a bipartisan commission to consider the fundamental questions at stake. Then, we can consider more permanent legislation after the initial panic has subsided.

Id.

22 Karen Hosler, *Bills Would Give Ashcroft Many Anti-Terrorism Tools; Attorney General Seeks to Remove Time Limits*, BALT. SUN, Oct. 10, 2001, at 7A (“Ashcroft’s hope was to produce a bill with no sunset, or perhaps one with a five year limit. ‘No one can guarantee that terrorism will sunset in two years,’ Ashcroft said . . .”).

23 *Id.* (“[He] estimated that much of the House support for the measure was based on [the] principle [of sunset].”); see also Nat Hentoff, *Terrorizing the Bill of Rights*, VILLAGE VOICE, Nov. 20, 2001, at 30. (stating that Senator Paul Wellstone “while troubled by the bill, felt reassured because of its ‘sunset’ provision ‘It is critically important that each and every one, every senator and representative, monitor the use of new authorities provided to the law enforcement agents to conduct surveillance. We’re going to have to monitor this very closely.’”).

24 Hosler, *supra* note 22.

25 USA PATRIOT Act, Pub. L. No. 107-56, § 224, 115 Stat. 272, 295 (2001).

26 See, e.g., 149 CONG. REC. S12,283 (daily ed. Oct. 1, 2003) (statement of Sen. Leahy).

With the PATRIOT Act, Congress provided government investigators with a virtual smorgasbord of new powers from which to choose Have we provided too many choices and too much power to a limited few? These are questions that require answers before the more far-reaching provisions of PATRIOT are etched into stone.

B. *The Judicial Sunset*

To my knowledge, no one has yet reflected upon, or advocated, judicial sunsets. This is not surprising since the standard conception of stare decisis is binary—either precedent should be given weight or it should not. And while some of the conditions for strong adherence to stare decisis have been enumerated (unanimity, recency, crystallization of social expectations), little discussion has taken place around the question of what methods a majority of the Court may use to signal its hesitation about freezing a legal principle into place.

It was perhaps because the language of judicial sunsets had not been invented, that the one possible recent example of it, *Grutter*, was itself hazy. Some of the haze is due, no doubt, to the way in which the Court shoehorned the sunset into the opinion. The Supreme Court for years has insisted on affirmative action having a “logical stopping point.”²⁷ But this stopping point was one internal to the program—the term was meant to refer to the time period in the affirmative action policy where the preference should end. In *Grutter*, however, the Court appears to have imposed an external, judicial stopping point—one that had nothing to do with the University of Michigan policy. The Court said, in essence, that it did not want to give the University carte blanche for all time.²⁸ This does not really appear to be a claim about a “logical stopping point” as such; rather, it appears to be one about the vitality of a Supreme Court opinion in the face of evolving circumstances.

Regardless of whether this “judicial sunset” reading of *Grutter* is descriptively correct, the above characterization of it enumerates a possible template for such sunsets. That is, the Court can hand down an opinion and announce that its holding is entitled to the full effect of the stare decisis doctrine for a set number of years (e.g., “In five

Id. Similar arguments are voiced in favor of state sunset provisions. See, e.g., COMMON CAUSE, THE STATUS OF SUNSET IN THE STATES 3 (1982) (“The automatic termination provision is an action-forcing mechanism to require state legislators to conduct serious program evaluation.”); DOUG ROEDERER & PATSY PALMER, SUNSET, EXPECTATION AND EXPERIENCE 13 (1981) (suggesting a similar point).

27 See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 238 (1995) (directing the lower court to examine “whether the program was appropriately limited such that it ‘will not last longer than the discriminatory effects it is designed to eliminate’”); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989) (rejecting “[t]he dissent’s watered-down version of equal protection review [because it] effectively assures that race will always be relevant in American life, and that the ‘ultimate goal’ of ‘eliminat[ing] entirely from governmental decisionmaking such irrelevant factors as a human being’s race,’ will never be achieved”) (citation omitted).

28 See *Grutter v. Bollinger*, 123 S. Ct. 2325, 2347 (2003) (“We expect that 25 years from now, the use of racial preferences will no longer be necessary . . .”).

years, we will be completely open to reconsideration of these claims.”), or that it will be binding law until a designated event (e.g., “Following the cessation of hostilities with Japan and Germany, we will be completely open to reconsideration.”). After the elapse of that time period, both lower courts and the Supreme Court would not be bound by the decision, though they could of course follow its reasoning and logic. In effect, the decision would become something akin to an out-of-circuit precedent for a federal court of appeals, in that it would have no formal binding weight as law, but its reasoning could be cited as persuasive authority via an affirmative codification of the old decision.

There are two principal reasons to adopt this approach. *First*, error correction. As human beings, judges necessarily will make mistakes. The likelihood of such mistakes is a function not only of cognitive biases and simple human error, but also of the time pressures the Justices face. Because the Justices are deciding so many momentous issues at any one time,²⁹ it is difficult for them to reach agreements, particularly long-term binding ones, without error. Mistakes are particularly likely to occur in areas that are beyond the Court’s expertise, matters in which judges have a tendency to overreact, and circumstances where background facts are subject to constant flux. Indeed, a decision might be appropriate when announced, but later events might collude to make the ruling ineffective or even wrong. Unlike Supreme Court doctrine, constitutional principles are self-consciously flexible and adaptable; as Chief Justice Marshall put it, the text is “intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.”³⁰

Instead of using devices that minimize the impact of systematic mistakes as part of a broader architecture of justice, our judicial system has adopted a system to magnify it. Both the doctrine of stare decisis and the superiority of the Supreme Court over the lower courts exacerbate Supreme Court errors, the former over time, the latter over distance. The stare decisis principle is so entrenched into jurisprudence that even when the Supreme Court realizes it made a mistake—such as *Plessy v. Ferguson*—it does not often admit the error.³¹

29 See Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 40 (1998); Henry M. Hart, *Foreword: The Time Charts of the Justices*, 73 HARV. L. REV. 84 *passim* (1959).

30 *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819) (emphasis omitted).

31 See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954) (declining to overrule *Plessy v. Ferguson*, 163 U.S. 537 (1896), simply mentioning that the *Plessy* ruling did not apply to schooling). In subsequent years, the Court applied the *Brown* equality

In these settings, and some others, the judicial sunset provides a method to prevent the automatic magnification of the mistake. The sunset gives the Court a way to convey its uncertainty about the long-term effect of its holding. The Justices may come to a decision in a particular case, but fear that the underpinnings of its decision may evaporate over time. Or they may know themselves well enough to know that they may be overreacting to a potential crisis, but at the same time believe that a generalist court, in the midst of a national security emergency, should not hamstring the executive branch.

Some might say that a judicial sunset is not necessary because the Court always retains the power to overrule itself. The same thing could be said of the legislature, which has the power to overrule itself and therefore arguably does not need a sunset provision either. The gambit here replaces reality with formalism: the Court rarely overrules itself, particularly given the strong adherence to *stare decisis*. And even if the Court became predisposed to reconsidering precedent more often, it would be difficult to signal to lower courts that the Court was ready to question one of its decisions. Instead, the matter would be likely taken as settled law, enshrined into the jurisprudence and accepted by lawyers and lower court judges alike.

Second, agenda-setting. Without the aforementioned signal that the holding of a case is up for reconsideration, political actors and private parties are unlikely to take decisions that flout precedent. Supreme Court decisions are generally understood to be binding law, and the incentives are to stay within that precedent, or at most to nibble around its edges. The upshot is that generating a test case to question a precedent is not easy and requires potential parties to read the tea leaves of the Supreme Court and buck an established case. And if that task is hard for potential parties, it is even harder for the lower courts, who are under orders not to call Supreme Court cases into question or to anticipate an overruling by the Court.³² The only other real alternative is for litigants to resort to counting votes and retirements, practices that assume that Justices cannot change their minds

principle to places like beaches and buses, but never forthrightly admitted that *Plessy* was wrong. See *Baltimore v. Dawson*, 220 F.2d 386 (4th Cir. 1955) (discussing beaches), *aff'd mem.* 350 U.S. 877 (1955); *Gayle v. Browder*, 142 F. Supp. 707 (D. Ala. 1956) (discussing buses), *aff'd mem.* 352 U.S. 903 (1956).

32 See *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); see also *Am. Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 180 (1990) (citing *Rodriguez de Quijas*).

as circumstances evolve. A judicial sunset, by contrast, puts the political branches, the media, other judges, and litigants on all sides on notice that the holding is bound to be questioned at a date later in time. As such, the announcement of a sunset can invite these entities to develop a factual record and data about the wisdom of retaining a judicial rule. (Consider Judge Posner's *Wittmer* opinion, which in effect called upon the government to develop a factual basis for its boot-camp affirmative action policy or face something akin to a sunset.³³) A judicial sunset may even prompt the Court, should it decide to reaffirm a lapsed precedent, to do so in a way that articulates the true basis for its decision, instead of crutching its holding to what the Court has said before.³⁴

C. Three Problems

1. Judicial Adventurism

Judicial sunsets could be in tension with *stare decisis* and may jeopardize one of its principal aims: to limit the ability of any one particular Court to impose its will on the nation. For example, in *James B. Beam Distilling Co. v. Georgia*, the Court stated that if it were to overrule a previous decision, and apply that overruling only to future (and not present) litigants, it would "minimiz[e] the costs of overruling, and thereby allo[w] the courts to act with a freedom comparable to that of legislatures."³⁵ From this perspective, the theory goes, *stare decisis* ensures that a contemporary Court, such as the Rehnquist Court, cannot depart too much from the Burger Court, the Warren Court, and so on. There is no doubt that, viewed in the backward looking direction of what the Rehnquist Court could do, respect for precedent can constrain decisionmaking. The rub, however, occurs when the temporal direction is flipped—and the point is made about how *stare decisis* empowers a contemporary Court to exert control over subsequent Supreme Court majorities far into the future. As discussed in Part I.B, once a specific legal matter has been resolved by the Court, the formal rule of *stare decisis*, the informal constraint of a passive judiciary, and the existence of other agenda-setting limits all

33 *Wittmer v. Peters*, 87 F.3d 916 (7th Cir. 1996). The case is discussed in Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1789–90 (1997).

34 Similar arguments have been made about legislative sunsets. See, e.g., AM. ENTERPRISE INSTITUTE, ZERO-BASE BUDGETING AND SUNSET LEGISLATION 26 (1978) ("Sunset would require an identification of program objectives" and "force simultaneous review of all programs having similar objectives or conflicting goals, thus forcing Congress to reconcile the inconsistencies, to choose the best, and to discard the worst.").

35 501 U.S. 529, 536 (1991) (Souter, J., announcing the opinion of the Court).

may preclude that matter from arising again. This precedent-laden alternative to judicial sunsets permits nine, or as few as five, Justices of the Supreme Court to make a ruling that can last indefinitely—binding people who have not yet been born. While in many cases such a result may be acceptable, surely when our nation's most cherished freedoms are at stake, and when there is a strong tendency for our judiciary to overreact to a crisis, this grave expansion of judicial power must be resisted.

A related criticism, however, is more acute: judicial sunsets give the Court a compromise option that enables them to experiment with broad deference to the government. A judicial sunset therefore can be antithetical to individual rights, because the Court will be tempted to defer to the Executive's broad claims and pay lip service to the notion of watching the judicial experiment unfold in the years to follow. This is, no doubt, a serious problem, because legislative sunsets give crisis-struck Justices a way to side with the government today but appear to leave the door open later on for reconsideration. Yet a similar argument could be voiced against legislative sunsets as well—indeed, Senator Feingold made it against the USA PATRIOT Act.³⁶ And were we to live in a world where Justices were always omniscient and benevolent, and only sided against the government when appropriate, a sunset (and, for that matter, much constitutional law) would be unnecessary. But in the real world, courts are already tempted to, indeed they do, uphold the executive branch at most turns today. It is hard to worry about sunset enabled judicial adventurism against a present-day backdrop of adventurism. To the extent that adventurism occurs, it may be just as likely to be in favor of individual liberty instead of national security. And because the sunset offers a way to temper the effects of any ruling adverse to the government, it enables experimentation without necessarily incurring severe long-term costs.

This argument should not be misunderstood as a criticism of the post-9/11 cases. Indeed, on many of the tough issues, I am inclined to side with the government. The point is, rather, a different one: we cannot be so sure of our constitutional views at this unique moment in our nation's history (a moment in which wars are often not formally declared, the enemy is not a state, and where modern technology enables even lone actors to be extremely destructive). Such constitutional doubts should be reflected in today's constitutional jurisprudence instead of being masked by legal platitudes. Yet the

36 See Hosler, *supra*, note 22. Senator Feingold was quoted as saying, "My view is that if we say something is so bad we're only going to do it for two years, maybe we shouldn't be doing it at all." *Id.*

dominant legal conception is to have courts announce holdings as if they are obvious and settled for all time. If this strategy is successful, it will ultimately freeze hastily considered law into the books. And if it is not, it will mean that a later Court will be forced to overrule some of today's jurisprudential excesses—a painful process that can diminish respect for the rule of law and delay justice for far too long.

2. Unsettled Law

One danger of judicial sunsets is that they can diminish the authority of Court pronouncements, and thereby make it harder for people to structure their affairs around a Court decision. This is a standard claim for *stare decisis*, that it helps resolve uncertainty around legal principles through long-lasting, authoritative, decision-making.³⁷ But that uncertainty is dissipated at a substantial cost—the possible freezing of bad law on the books. In response, some might be tempted to claim that bad law does not get frozen on the books because the Supreme Court is free to overrule itself. But that gambit ultimately fails in many cases, and not simply because of its rigid formalism. If the gambit is descriptively correct, in that the Court will overrule itself when necessary, then an ideal rule would be one that enabled the Court to put the parties and the nation on notice that such overruling is possible at a later point. Without that notice, people can be caught unaware of the possibility of a switch-in-time, and therefore the effects from unsettled law can be far worse.

Of course, such honesty has a cost. If the Court were to admit doubt about its ruling, it might diminish respect for the rule of law. Such arguments have been voiced against the practice of publishing dissents.³⁸ Yet those arguments were rejected with respect to dissents,

37 See *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989).

[T]he doctrine of *stare decisis* is of fundamental importance to the “rule of law”. . . . [I]t is indisputable that *stare decisis* is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon “an arbitrary discretion.”

Id.; see also *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986) (stating that *stare decisis* ensures that “the law will not merely change erratically” and “permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals”).

38 *Pollack v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 608 (1895) (White, J., dissenting) (“The only purpose which an elaborate dissent can accomplish, if any, is to weaken the effect of the opinion of the majority, and thus engender want of confidence in the conclusions of courts of last resort.”).

and they should be rejected here as well.³⁹ There is no reason to think that the judicial confession that circumstances, facts, or even judgments may change over time will erode the judiciary's respect. Far from it. The public repression of jurisprudential doubt cannot last forever, and, like any other forced obfuscations, it eventually bubbles up to the surface. One symptom of this phenomena is the fact that the Court does overrule itself at times—despite its earlier pronouncements about the wisdom of its decision.⁴⁰ This point exposes the fault line in the oft-repeated claim that adherence to *stare decisis* is necessary to preserve the legitimacy of the Court. The reason why expectations settle around the earlier decision is the Court's refusal to admit doubt, its proclivity to "sweeping all the chessmen off the table," as Learned Hand put it.⁴¹ But a judicial sunset, by contrast, would permit expectations around a decision to be more realistic and more flexible. Indeed, if Hand's characterization of the dominant judicial writing style is correct, it underscores, all the more, the need for some mechanism that the present-day Court majority can use to alert subsequent jurists of its doubts and hesitations while crafting an opinion.

Open, honest, communication between the judiciary and the public may have drawbacks, but one advantage is that it helps foster a truer sense of expectations about what the Court is likely to do regarding a given set of issues.⁴² Of course, such guidance is only one part of a viable legal system, for certainty can be purchased through any number of legal rules (e.g., settling cases by the principle of which party's

39 CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 67 (1928). Justice Hughes noted that

[t]here are some who think it desirable that dissents should not be disclosed as they detract from the force of the judgment. Undoubtedly they do . . . [b]ut unanimity which is merely formal, which is recorded at the expense of strong, conflicting views, is not desirable . . . because what must ultimately sustain the court in public confidence is the character and independence of the judges.

Id.

40 For example, regarding peremptory challenges, the Court stated in *Swain v. Alabama*, 380 U.S. 202 (1965), that

[the peremptory challenge] is, as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose . . . [The presumption] that the prosecutor is using the State's challenges to obtain a fair and impartial jury . . . is not overcome and the prosecutor therefore subjected to examination [where] all Negroes were removed from the jury or that they were removed because they were Negroes.

Id. at 219, 222. Despite these claims, *Swain* was overruled by *Batson v. Kentucky*, 476 U.S. 79 (1986).

41 LEARNED HAND, *THE SPIRIT OF LIBERTY* 131 (3d ed. 1960).

42 Katyal, *supra* note 33, at 1800–02.

name comes first in the alphabet). The judicial sunset does not attain this level of certainty, nor should it. The need for certainty must be tempered by a willingness to reconsider vexing constitutional issues anew, for the wisdom of the Framers can be obscured through the fog of precedent.⁴³

3. Previous Parties

A final problem concerns litigants who have already had their cases decided against them. Suppose that one of the *Quirin* Nazi saboteurs who received a death sentence had received a life sentence instead, and was still in jail. If the Supreme Court could reopen the question of whether military tribunals are constitutional today, its ruling might have implications for the saboteur's life sentence. The reopening of such questions then puts courts in a pickle: should they apply their rulings retroactively, and thereby diminish the power of an adjudication in the case at hand, or should they ignore basic principles of equality?⁴⁴

There are two primary answers to this question. First, the problem here is not different than in any number of other areas of law where the Court has to struggle with whether to apply a new rule retroactively.⁴⁵ Consider, in the habeas context, *Teague v. Lane*,⁴⁶ and in the civil context, *James B. Beam Distilling Co. v. Georgia*.⁴⁷ Indeed, it is "overwhelmingly the norm" to apply decisions retroactively,⁴⁸ and the

43 See generally Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000).

44 In this specific case, however, the argument is a weak one, as a claim challengers to today's tribunals would make is that, unlike with the Nazi saboteurs, no formal declaration of war has been made.

45 Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56 (1965) (discussing the Supreme Court's decision in *Linkletter v. Walker*, 381 U.S. 618 (1965), which limited the effect of court decisions to prospective application).

46 489 U.S. 288 (1989).

47 501 U.S. 529 (1991). *James B. Beam* failed to obtain a majority opinion for the Court, but its principles were subsequently clarified (a bit) in *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993):

When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

Id. at 97.

48 *James B. Beam*, 501 U.S. at 535; see also *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting).

existence of judicial sunsets will do little to change that basic practice. Of course, a case may come along where the need for finality is so strong that it trumps equality concerns, and, if so, a case that reversed a lapsed precedent need not be given retroactive effect. But that is a point about retroactivity in general, and not something unique to the sunset. Second, as explained in the preceding section, judicial sunsets function by diminishing the settled expectations that cohere around a given case. If the parties and public know that an opinion announced in World War II might be questioned in subsequent years, then it alters the expectations they may have about the adjudication itself. In this way, a chief worry of the retroactivity critics, that the overruling will upset a crystallized order, is diminished by the announcement of the sunset itself.

II. TWO EXAMPLES

A. *The Constitutionality of Military Tribunals*

The constitutionality of military tribunals is almost always centered around the meaning of *Ex parte Quirin*,⁴⁹ the World War II case in which the Supreme Court permitted the military trial of Nazi saboteurs. There are many things that might be said about the wisdom and legality of military commissions, but resolution of these disagreements should not turn on the meaning of a sixty year old case. Leave aside the theatrics and dubious history of the case when it was decided (whereby the Supreme Court immediately ruled and only months later—after six of the saboteurs were executed—issued an opinion),⁵⁰ and ask yourself whether it makes sense to decide these fundamental questions by arguing about what the Supreme Court actually held in 1942. That is a useless exercise.⁵¹ We should be asking ourselves whether commissions comport with the best understandings of separation of powers, due process, and fair play, not technical questions like whether the Supreme Court confined its holding to particular facts in the *Quirin* case, such as the declaration of war.

49 317 U.S. 1 (1942).

50 See David J. Danelski, *The Saboteurs' Case*, 1 J. SUP. CT. HIST. 61 *passim* (1996).

51 The one way in which *Quirin* is relevant is as a statutory precedent. The best argument for congressional authorization of tribunals is that Congress reenacted the Articles of War as part of the Uniform Code of Military Justice in 1950, and that Congress therefore enacted the *Quirin* Court's interpretation of the laws of war. Yet there are any number of reasons why this argument fails. See Katyal & Tribe, *supra* note 2, at 1284–305 (explaining why Congress in 1950 did not codify such a broad statutory precedent).

Quirin is therefore not only old, it is actually strikingly different. For World War II was a war of limited duration, unlike the perpetual war against terror. *Quirin* itself dealt with a circumstance in which Nazi saboteurs showed up in German uniforms on American shores and promptly ditched them, thereby making their status as violators of the laws of war obvious, not like today where the enemy wears no uniform. Yet the fact that it is the Court's most recent pronouncement on military tribunals alone means that the decision becomes the focal point for resolving these issues today.

It would be a striking thing if the *Quirin* Justices thought they were deciding the legality of military commissions for the next sixty years. They had no opportunity, despite their obvious disagreements on the case, to signal their hesitation. The only path open to the Justices was to dissent. Yet dissent could not fully capture what many on the Court may have felt—that they were in the midst of a World War and did not want to shackle the President at that moment. The vehicle of judicial sunsets could have created a legal form for the expression of that feeling, while enabling those who shared that feeling to also express doubts about the long-term vitality of the Court's holding.

But because *Quirin* has no sunset, we face a guessing game today as to whether the Rehnquist Court will feel itself bound by its rather loose reasoning. And in the interim, both sides of the debate proceed as if *Quirin* is good law, and read the decision in ways consistent with their beliefs about the constitutionality of the tribunals. This system invites the strategic distortion of Supreme Court precedent, and creates false jurisprudential parameters for resolving such a momentous constitutional dispute. In my view, there are any number of reasons why we should treat *Quirin* as a lapsed precedent,⁵² but the resolution of such matters are too fundamental to be left up to bickering by parties and judges who use arguments from precedent as smokescreens for policy objectives. Had the Supreme Court said in 1942 that the force of *Quirin* would lapse, it would have invited testing of its constitutional reasoning and unleashed a process whereby the Court's constitutional jurisprudence hews more closely to contemporary facts than antiquated and hastily made precedent.

B. The Guantanamo Detainees and Habeas Corpus

The Supreme Court has granted certiorari in two cases that present the question of whether those detained at Guantanamo Bay,

52 See *id.* at 1290–306 (outlining these reasons).

Cuba, have recourse to the federal courts.⁵³ The U.S. Government has taken the position throughout the litigation that they do not, focusing on *Johnson v. Eisentrager*, a case that arose after World War II, in which individuals who were convicted by a military tribunal asked whether they had the right to file habeas petitions.⁵⁴ The Supreme Court in *Eisentrager* answered this question in the negative.⁵⁵

In the current Supreme Court litigation, the lawyers for the Guantanamo detainees argue that the detainees have the right to file habeas petitions. There are two striking things about their claim, each of which underscores the need for judicial sunsets. First, even the petitioner-challengers do not really appear, at the time of this writing, to be questioning *Eisentrager* in any serious fashion. *Eisentrager* is taken by both parties as the golden rule—but when exactly did this fusty case become as important as the Constitution itself? The very fact that a half-century after the decision, the plaintiffs in the Guantanamo cases feel compelled to work within the *Eisentrager* framework, rather than to question it as bad law, speaks volumes about the need for judicial sunsets in this area. On a matter as fundamental as who has access to civilian courts, an old precedent decided in a different era should not control today's resolution of such events. (And this is particularly so when that precedent itself ignored longstanding earlier precedent that reached the opposite conclusion.⁵⁶) Yet not only the lawyers, but every court to have considered the issue, treats *Eisentrager* like the gospel. This reverence for precedent stultifies debate, impairs clear thinking, and does a disservice to constitutional government.

Second, the parties in the case, at the time of this writing, have filed briefs that are in *agreement* that those convicted by lawful military tribunals at Guantanamo cannot file habeas petitions challenging the

53 *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *cert. granted*, 124 S. Ct. 534 (2003). I represent the Military Defense Attorneys in the Office of Military Commissions as Amicus Curiae in this case. This Article does not, of course, speak for them in any way.

54 339 U.S. 763 (1950).

55 *Id.* at 777–81.

56 For discussions, see generally Brief of the Military Attorneys Assigned to the Defense in the Office of Military Commissions as Amicus Curiae in Support of Neither Party, *Al Odah v. United States*, 124 S. Ct. 534 (2003) (No. 03-343), *available at* http://www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/91/AmicusCuriae_Military_Attorneys.pdf; Brief Amici Curiae of Legal Historians in Support of the Petitioners, *Rasul v. Bush*, 124 S. Ct. 534 (2003) (No. 03-334), *Al Odah v. United States*, 124 S. Ct. 534 (2003) (No. 03-343), *available at* http://www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/90/amicuscuriae_Legal_Historians_Brief.pdf.

jurisdiction of the tribunals or the tribunals themselves.⁵⁷ Why would a left-leaning group like the Center for Constitutional Rights take such a position? The answer is simple: to get around precedent. The Center's lawyers are arguing here, in effect, that *Eisentrager* was correct but that it should be limited to those convicted by tribunals.

There are any number of reasons why, on the merits, this view is exactly backwards, and why those who have faced tribunals have a better claim to civilian jurisdiction than the ordinary detainee. But because *Eisentrager*'s precepts become the central focus of the case, those questions are not seriously asked by either party in the current litigation. Indeed, there is a tremendous risk that the Supreme Court will be tempted to take the concession by both sides as a strong sign that tribunal convicts cannot file habeas petitions. When announcing their holding, if they side with the government, the Court would then not even have to place a cautionary note in the opinion reserving the separate question of tribunals and access to the courts. They could simply state that no one at Guantanamo has the right to file a habeas petition.

In a world with judicial sunsets, however, the path would be a lot easier. *Eisentrager* could have been limited in time, so that it would not be the focal point for today's resolution of the matter. And irrespective of whether a sunset should have been placed in *Eisentrager* itself, my claim is that today's Supreme Court in the Guantanamo cases could decide the issue for either side in a way that would preserve, explicitly, the possibility of further review, and even force such review by employing a short time limit for the sunset. If the Court thought about the problem this way, then it would sidestep much of the risk of overreaching by barring tribunal convicts from ever having recourse to civilian justice. And in this way, irrespective of whether the government or the detainees win the bottom line, a sunset could resolve the case in a way that understood that Justices sometimes make mistakes, not only in the ultimate holding, but also in the loose lan-

57 Petition for a Writ of Certiorari at 10, *Rasul v. Bush*, 124 S. Ct. 534 (2003) (No. 03-334) ("It is one thing to hold that war criminals . . . cannot seek further review in a civilian court. It is quite another to extend that holding to people who have never been charged or afforded any process."); *id.* at 14 ("Unlike Petitioners, the prisoners seeking habeas relief in *Johnson [v. Eisentrager]* were convicted war criminals."); *id.* at 17:

[I]t is apparent that the Court sensibly concluded in *Johnson* that war criminals tried, convicted, and sentenced by a lawful commission, whose procedural protections were not the subject of complaint, were not 'due' any additional process in a civilian court; certainly they could not claim a Fifth Amendment right to be free from military trial.

guage they might be tempted to use (particularly when both sides make strategic concessions that make particular issues appear easier than they are).

Finally, the use of a sunset permits later courts to more easily incorporate the impact of changes in the international and legal landscape. Had a sunset been used in *Eisenrager*, for example, it would be easier to take account of the earth-shattering revolutions in international law (the 1949 Geneva Convention, ratified by the United States in 1955; the due-process revolution in the 1960's; the adoption of the Uniform Code of Military Justice in 1951; liberalizations of both habeas and mandamus law). But because of the wooden insistence on *stare decisis*, it becomes very difficult for lawyers, lower court judges, and perhaps even the Supreme Court itself to evaluate these changes and how they transform the operating principles of the Second World War.

CONCLUSION

Justice O'Connor's opinion for the Court in *Grutter* contains the seeds of a new way of thinking about adjudication. While judicial sunsets may not be appropriate in all federal court settings, when the U.S. Supreme Court is deciding momentous national security cases, a sunset captures many of the advantages that its legislative counterpart has. In particular, it can avoid the problem of freezing bad law into place, allow for prompt reconsideration of possibly dubious decisions, and send a signal to litigants and others in our nation that a precedent should be questioned. While a judicial sunset of a bad decision is not as great as getting the decision right the first time around, it is a good second-best one. That is why legislatures have come to embrace the sunset, and why the Court should, too.